Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1998

DARRELL SPENCER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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December 23, 1998

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103 pp

QUESTIONS PRESENTED

I.

Does this Court have jurisdiction to vacate the conviction and sentence for a pre-*Bailey* jury trial conviction to a violation of 18 U.S.C. § 924(c)(1) where (a) the conviction was based on erroneous jury instructions as a result of the misinterpretation of the § 924(c)(1) statute; (b) Petitioner's section 2255 motion has been denied by the district court, and (c) Petitioner's application for a certificate of appealability has been denied by the court of appeals?

II.

If so, was Petitioner's pre-*Bailey* conviction to using and carrying a firearm during and in relation to a drug trafficking offense a violation of due process where the jury instructions on § 924(c)(1) were erroneous and there was insufficient evidence to support a conviction if the jury had been properly instructed?

III.

Was Petitioner denied the effective assistance of counsel when trial counsel failed to object to sentencing entrapment in light of the fact that the arresting agents set up the drug quantity purchase so as to increase Petitioner's guidelines range?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are: (1) United States who was the Plaintiff in the district court criminal action, Respondent in the section 2255 proceedings, and Appellee in the court of appeals, and (2) Darrell Spencer who was the Defendant in the district court criminal action, Petitioner in the section 2255 proceedings, and Appellant in the court of appeals.

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NO. 98-

In The
Supreme Court of The United States
October Term 1998

DARRELL SPENCER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Darrell Spencer respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding denying Petitioner's application for a certificate of appealability with respect

to a *Bailey*[1] issue and the ineffective assistance of counsel issue with respect to a claim of sentencing entrapment brought pursuant to Petitioner's first § 2255 motion under 28 U.S.C. § 2255. Certiorari is requested regarding an important federal question decided by a United States court of appeals in a way that conflicts with relevant decisions of this Court.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit (denying Petitioner's application for a certificate of appealability) that gives rise to this Petition is not published and is reprinted at A1. By unpublished Order dated September 29, 1998, the Sixth Circuit denied Petitioner's Petition for Rehearing. This Order is reprinted at B1. The Order of the District Court

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[1] *Bailey v. United States*, 516 U.S. 137 (1995).

denying Petitioner's section 2255 motion is unpublished and reprinted at C1.

JURISDICTION

The Order of the Sixth Circuit denying Petitioner's application for a certificate of appealability was entered on June 11, 1998. The Sixth Circuit denied Petitioner's timely-filed Petition for Rehearing on September 29, 1998. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.3, Supreme Court Rules, this Petition for Certiorari has been filed within 90 days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

28 U.S.C. § 2253(c)(1) and (2) provide:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State court; or

(B) the final order in a proceeding under § 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

———✦———

18 U.S.C. § 924(c)(1) provides in pertinent part:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United

States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, . . . nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

———————✦———————

Fed.R.Evid. 803(d) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or

condition.

STATEMENT OF THE CASE

Petitioner was indicted in the Eastern District of Michigan on February 3, 1993 with one count of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1), one count of possession with intent to distribute cocaine base within 1000 feet of a public school, in violation of 21 U.S.C. §§ 841(a)(1) and 860, and one count of use of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). On June 25, 1993, following a five-day jury trial before United States District Judge Nancy Edmunds, Petitioner was found guilty as charged on all three counts.

At the time of Petitioner's trial, the jury was given an erroneous and improper instruction regarding the elements necessary to support a

conviction under § 924(c)(1).[2] The district court gave the following erroneous instruction:

> For the purpose of Count Three, the word "carries" does not require that the government prove actual possession, nor does the word "use" require the government to prove that the defendant fired or displayed the firearm. Rather, it is sufficient to convict the defendant if you find beyond a reasonable doubt that he had possession of a firearm, or that he had a firearm under his control and the firearm was possessed or controlled in any manner to facilitate the drug trafficking crime. Thus, if you find beyond a reasonable doubt that the defendant had the weapon, as charged in Count

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[2] The complete jury instructions on the § 924(c)(1) charge are reprinted at F1-F6.

> Three readily accessible for possible use to secure or protect the drugs, the drug proceeds, or the participants in the drug transaction, you can find him guilty of Count Three.

See F4 of the Appendix.

There is no dispute that the foregoing instruction was erroneous and contrary to *Bailey*.[3]

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[3] In fact, the United States conceded during the section 2255 proceeding that the instruction on the 924(c) charge was erroneous. The United States, however, argued that there was sufficient evidence to support a 924(c) conviction under either the "use" or "carry" prong of 924(c) even under the clarified instruction in *Bailey*. The Court in *Bailey* held that to obtain a conviction for use of a firearm under 924(c)(1), the government must prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 144. This Court said that "use" would include

(continued...)

In addition to a *Bailey* violation, Petitioner was denied the effective assistance of counsel during his sentencing since counsel failed to object to a clear case of sentencing entrapment by the United States and counsel failed to seek a downward departure on the basis that government agents ultimately dictated Petitioner's sentence and punishment since they established the

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[3](...continued)
such activities as "brandishing, displaying, bartering, striking with, . . . firing or attempting to fire, a firearm," or referring to a firearm so as to intimidate another person. *Id.* at 148. However, the Court added, the "inert presence of a firearm, without more, is not enough to trigger section 924(c)(1) . . . A defendant cannot be charged under section 924(c)(1) merely for storing a weapon near drugs or drug proceeds." or for "placement of a firearm to provide a sense of security or to embolden." *Id.* at 149.

quantity and location of the buy.[4] Testimony during the trial indicated that it was DEA agents that set up the buy and ordered the quantity of drugs (six ounces) which led to Petitioner's arrest.[5] Appendix H1 contains a portion of the government's closing argument in which the AUSA clearly states that it was the DEA that told Vaughn how much to obtain from the source.

On September 14, 1993, Petitioner was sentenced to 262 months imprisonment on the cocaine base counts, concurrently, and 60 months imprisonment, consecutive

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[4] The sentencing transcript reveals that not only did counsel not argue entrapment, but he **admitted** that he had very little knowledge of the Sentencing Guidelines and their application. *See* G1-G3.

[5] Prior to this second controlled buy, the DEA, using a confidential informant, set up an initial buy from a Myron Vaughn for two ounces. After Vaughn was arrested, he agreed to cooperate and telephone his alleged source of supply.

on the 924(c) count. Petitioner directly appealed to the Sixth Circuit Court of Appeals.[6] The Sixth Circuit, in an unpublished opinion, affirmed Petitioner's sentence and conviction.[7]

At the time of this pre-*Bailey* trial, the Sixth Circuit applied a broad definition of "use" under § 924(c)(1), *United States v. Moore*, 76 F.3d 111, 112 (6th Cir. 1996). As the Sixth Circuit has recently recognized with respect to pre-*Bailey* cases:

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[6] In the direct appeal, Petitioner raised three issues: (1) the trial court committed reversible error in not granting a mistrial following the government's opening statement; (2) the trial court committed reversible error in not granting a mistrial as to the testimony of Petitioner's prior bad acts; and (3) the evidence presented did not support a finding of guilt beyond a reasonable doubt.

[7] *United States v. Spencer*, No. 93-2273 (6th Cir. 1995), *cert. denied*, 515 U.S. 1149 (1995).

> **it is clear that the court, counsel, and the accused were all operating under what we now know was a too-inclusive view of section 924(c)(1)'s reach.**

In re Hanserd, 125 F.3d 922, 927 (6th Cir. 1997).

After *Bailey* was decided, on April 1, 1997, Petitioner filed a *pro se* first section 2255 motion raising three main issues, including a *Bailey* violation and ineffective assistance of counsel on the basis of sentencing entrapment. The district judge referred the matter to United States Magistrate Judge Thomas A. Carlson for a report and recommendation. The Magistrate Judge issued a report and recommendation that Petitioner's section 2255 motion be denied.[8] Although the Report acknowledged a *Bailey* violation with respect to the jury instructions, the Report nonetheless concluded that a properly instructed jury would still have

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[8] The Magistrate Judge's Report and Recommendation is reprinted at I1.

found the Petitioner guilty of "using" and "carrying" the firearm. The Magistrate Judge's decision was largely based on inadmissable hearsay that was introduced at trial through DEA agent Richard Crock. Crock testified that after the van had come to a stop following an accident with another vehicle, Myron Vaughn, the cooperating individual, allegedly told Crock that Petitioner had pointed a gun at him while they were in the van and that Petitioner had thrown several ounces of crack cocaine out the window during the chase. Crock's testimony about what Vaughn told him is reprinted at J1-J8. The testimony should not have been admitted because not all of the foundational elements under Fed.R.Evid. 803(2) had been established. Vaughn did not make the statements attributed to him by Agent Crock until after **several minutes** had elapsed after the collision and the time he was taken into custody. These several minutes were sufficient to negate the district court's conclusion that Vaughn was still under

the influence of a startling act and therefore, his statements to Agent Crock constituted excited utterances.

Crock's testimony is suspect at best because Vaughn's testimony before the grand jury indicates to the contrary. Vaughn testified that there was another passenger in the van besides the Petitioner. It was the other individual who gave Petitioner the drugs and the gun to throw out the window. Petitioner had only momentary possession of both the drugs and the gun. Vaughn did not say that Petitioner, at any time during the chase, ever pointed the gun or threatened Vaughn with it. Vaughn's grand jury testimony is reprinted at K1-K10.

In the interim between *Bailey* and Petitioner's section 2255 motion, in April, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter "AEDPA"]. The AEDPA placed restrictions on the right to appeal a final order in a section 2255 proceeding, including a

certificate of appealability and a substantial constitutional violation as opposed to a statutory violation, 28 U.S.C. § 2253(c)(1), (2).

Petitioner's application for a certificate of appealability was denied by a panel of the Sixth Circuit in an order stating that Petitioner had not made a substantial showing of the denial of a federal constitutional right for the reasons stated by the district court. A1.

Recently, another panel of the Sixth Circuit again acknowledged the pre-*Bailey* errors in the Sixth Circuit and held that:

> coincidental or accidental placement of a firearm near cash or drugs is insufficient to sustain a conviction under section 924(c)

because the gun is not carried in relation to the drug crime. *United States v. Malcuit*, 104 F.3d 880, 884-86 (6th Cir. 1997), citing *Smith v. United States*, 508 U.S. 223 (1993). As stated by the Sixth Circuit in *Malcuit, supra:*

> . . .some of our pre-*Bailey* opinions appear to fuse 'use' and 'carry' into a single requirement, and then to find this requirement satisfied by mere possession.

104 F.3d at 884-85. The result in this case was a conviction in violation of *Bailey* and its progeny and Petitioner's inability to obtain appellate review. This Petition is filed because of the rejection of Petitioner's efforts to set aside the 924(c)(1) conviction as a result of erroneous jury instructions, and for resentencing on the basis of sentencing entrapment.

REASONS FOR GRANTING THE PETITION

A. *BAILEY* VIOLATION

The Sixth Circuit has stated that *Bailey* held that the lower courts:

> this [Sixth] Circuit included, had been sustaining convictions under section 924(c) for conduct that was not illegal.

In Re Hanserd, 123 F.3d at 924.

In *Muscarello v. United States*, 118 S.Ct. 1911 (1998), this Court held that an individual "carries" a weapon for purposes of § 924(c)(1) even if the weapon is not physically on the person. In *Muscarello*, the defendant admitted during his plea proceedings that he had "carried" the gun "for protection in relation" to the drug offense. Later, he attempted to argue that because the gun was in the locked glove compartment of the vehicle, his "carrying" the gun did not fall within the scope of the statutory word "carries." This Court rejected that argument and held that "carries a firearm" includes weapons carried on a person as well as weapons placed in a bag in a car. The Court further held that Congress did not intend to merely limit the scope of the phrase to instances in which a gun is carried "on the person." *Id.*

In this case, there was an erroneous instruction both on the "carry" and "use" prongs of § 924(c)(1). The instruction stated that the government was not

required to prove that the defendant had actual possession for purposes of establishing the "carry" element nor did the "use" element require the government to prove that the defendant fired or displayed the firearm. See F1-F6. Under *Bailey* and *Muscarello,* the instruction was clearly erroneous. Petitioner had momentary possession of both the drugs and the weapon for purposes of throwing them out the window after they were handed to him by the third passenger in the vehicle. The government did not establish that Petitioner had dominion and control over either the drugs or the weapon prior to that momentary possession.[9]

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[9] Even during jury deliberations, the jury struggled with this issue since on several occasions, it requested clarification of the issue whether a confederate of the Petitioner in possession of the gun with Petitioner's knowledge tantamounts to the Petitioner being in possession of the gun. To aid the jury, the district judge merely re-

(continued...)

As for the argument that there was sufficient evidence to convict under the "use" prong because of the testimony of Agent Crock, that testimony was erroneously admitted as an excited utterance to the hearsay rule. Rule 803(d). In *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1057 (6th Cir. 1983), the appeals court set forth the elements for admission under Rule 803(2):

> Three elements are necessary for the admission of an excited utterance. First, there must be an event startling enough to cause nervous excitement. Second, the statement must be made before there is time to contrive or misrepresent. And, third, the statement must be made while the person is under the stress of the excitement caused by the

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[9](...continued)
issued the aiding and abetting instruction.

event.[10]

In this case, it was several minutes after Vaughn was arrested and placed in Agent Crock's vehicle that he allegedly made the statements that were testified to by the Agent. Defense counsel objected to these statements but the district court found that they were admissible under Rule 803(2). This testimony was erroneously admitted because the time interval between the event and the statement was long enough to permit reflective thought on the part of Vaughn and therefore, this evidence was inadmissible hearsay.[11]

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[10] In *Haggins*, the Sixth Circuit held that the statements of a four year old child an hour to an hour and a half after she suffered very serious injuries were admissible because there was testimony that at the time the statements were made, the child was still suffering from the effects of the event. She was bleeding and in critical condition. *Id.* at 1058.

[11] As further support of this
(continued...)

B. SENTENCING ENTRAPMENT

There is no dispute that the government set up the second buy. The DEA told Vaughn to contact his alleged source of supply and order up **six(6)** additional ounces of cocaine base. During the initial arrest of Vaughn, he solely had in his possession **two(2)** ounces. This

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[11](...continued)
position, it is obvious that the jury disregarded this testimony since it struggled with the 924(c)(1) charge. If the jury had believed the agent, then conviction under the "use" prong would have been easily reached. In any event, in *Griffin v. United States*, 502 U.S. 46, 59 (1991), this Court stated that, when one of the theories of liability is legally inadequate, the verdict must be set aside since jurors are unable through their own intelligence and expertise to sort through the legal error and come to a decision. In this case, since the instruction was legally inadequate and erroneous on both elements (use and carry) and since it is apparent that the jury struggled with this issue, Petitioner's conviction on this charge should be vacated.

was a clear case of sentencing entrapment since the ordering of the six ounces placed Petitioner in the over 150 grams category, which gave him a base offense level of 36 under the Sentencing Guidelines.[12] In *United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994), the Court held that the government had entrapped Staufer by convincing him to sell a quantity of drugs in excess of what he was predisposed to sell. The Court found that sentencing entrapment occurs when a defendant who is otherwise predisposed to commit a minor or lesser offense is entrapped into committing a greater offense subject to more severe punishment.[13] The Court further observed

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[12] Had an order been placed for two ounces, Petitioner would have been at base offense level 32, which would have resulted in a sentence of 52 months less than he received.

[13] In fact, the Ninth Circuit acknowledged that with the onset of the Sentencing Guidelines' mechanism of

(continued...)

that "misconduct of an entrapping nature" may warrant a downward departure in part because "entrapment, and issues like it, can cast light upon a defendant's culpability." *Id.* at 1107 (quoting from *United States v. Pacheco-Osuna*, 23 F.3d 269, 272 (9th Cir. 1994).[14]

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[13](...continued)
boosting sentences based on the cumulation of additional drug sales, there is potential for abuse by police. *Staufer, supra* at 1107, citing *United States v. Calva*, 979 F.2d 119, 123 (8th Cir. 1992).

[14] It should be noted that the *Staufer* decision is cited in a recent article in the Pittsburgh Post-Gazette following the paper's two-year investigation of federal law enforcement officials' misconduct. The article cited the *Staufer* case as evidence of the government's misconduct and abuse of the Sentencing Guidelines because they sought a bigger drug deal to ensure a stiffer prison sentence for the accused. Pittsburgh Post-Gazette, Nov. 23, 1998, at A6, col 1.

In this case, it was clear that Petitioner was entrapped by the DEA. The AUSA admitted during closing arguments that the quantity that was ordered for the second buy was at the request of the DEA. See H1. Trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) by not raising this issue since this establishes that counsel's performance was deficient and the deficiency prejudiced Petitioner. In fact, counsel conceded that he had very little knowledge of the Sentencing Guidelines and their particular application to this case. See G3.[15] Although the Sixth Circuit does not specifically recognize sentencing

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[15] In order to obtain collateral relief, a prisoner must show cause for his failure to previously raise this issue and actual prejudice. *United States v. Frady*, 456 U.S. 152 (1982), *Murray v. Carrier*, 477 U.S. 478, 497 (1986). The ineffective assistance of counsel constitutes cause. *Murray, supra; Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993).

entrapment as a basis for a downward departure, the Sixth Circuit has not conclusively reached a decision that given the proper circumstances, such a defense would or would not be given recognition. *See United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996). Therefore, Petitioner should be resentenced and should be permitted to seek a downward departure on the basis of entrapment and governrment misconduct.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition and issue a writ of certiorari vacating the sentence and conviction of Petitioner on the 924(c) count or, vacate the sentence and remand for resentencing on the basis of entrapment or, in the alternative, remand to the Sixth Circuit and order the entry of a certificate of appealability.

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Dated: December 18, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
DENYING IN PART
CERTIFICATE OF APPEALABILITY

Sixth Circuit Case №. 98-1010
Filed June 11, 1998

Pages A-1 thru A-4

No. 98-1010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 11 1999
LEONARD GREEN, Clerk

DARRELL SPENCER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MARTIN, Chief Judge.

Darrell Spencer moves for a certificate of appealability on appeal from the district court's order and judgment denying his motion to vacate his sentence filed under 28 U.S.C. § 2255. In addition, Spencer moves to stay proceedings while he investigates the applicability of a recently-decided Seventh Circuit case to his appeal.

A jury convicted Spencer of possession with intent to distribute cocaine base within 1000 feel of a school, and using or carrying a firearm during and in relation to a drug trafficking offense. The district court sentenced him on September 17, 1993, to a total of 322 months in prison and ten

years of supervised release. A panel of this court affirmed Spencer's conviction of direct appeal. *United States v. Spencer*, No. 93-2273, 1995 WL 5615 (6th Cir. Jan. 4, 1995), *cert. denied*, 515 U.S. 1149 (1995).

In his motion to vacate, Spencer raised three grounds for relief: (1) the district court erred in instructing the jury on the aiding and abetting when he was not charged under 18 U.S.C. § 2; (2) the jury instruction given for the firearm count was erroneous in light of *Bailey v. United States*, 516 U.S. 137 (1995); and (3) counsel rendered ineffective assistance by failing to object to the aiding and abetting instructions, failing to object to the drug quantity on which he was sentenced, failing to call an expert witness on whether the substance involved was cocaine base or crack, and stipulating to government's laboratory report on the substance in evidence.

In a report filed on September 9, 1997, a magistrate judge recommended that Spencer's § 2255 motion be denied. The magistrate judge found that Spencer had not demonstrated cause and prejudice to excuse his default in failing to raise his aiding and abetting jury instruction on direct appeal and, in any event, the

issue was without merit. Citing this court's recent opinion in *United States v. Mauldin*, 109 F.3d 1159, 1161 (6th Cir. 1997), the magistrate judge next concluded that, given the evidence presented at trial, a properly instructed jury would have found Spencer guilty of using or carrying a firearm during and in relation to his drug trafficking offense. Finally, the magistrate judge found that Spencer had failed to establish either that counsel's performance was deficient, or that counsel's alleged errors prejudiced the defense so as to render the result of the trial unreliable. Spencer did not object to the magistrate judge's report and recommendation. The district court adopted the magistrate judge's report and denied Spencer's § 2255 motion in an order and judgment filed on December 2, 1997.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a federal constitutional right. 28 U.S.C. § 2253(c)(2); cf. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The record before the court does not meet this standard for the reason stated by the district court. Moreover, Spencer has waived his right to appeal by failing object to the magistrate judge's report

and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Accordingly, Spencer's motion to stay proceedings and his application for a certificate of appealability are denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
PETITION FOR REHEARING

Sixth Circuit Case №. 98-1010
Filed September 29, 1998

Pages B-1 thru B-1

No. 98-1010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRELL SPENCER,	)	FILED
	)	SEP 8 9 1998
Petitioner-Appellant,	)	LEONARD GREEN, Clerk
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

Before: WELLFORD, NORRIS, and BATCHELDER, Circuit Judges.

Darrell Spencer petitions for rehearing of this court's order entered on June 11, 1998. That order denied Spencer's application for a certificate of appealability so that he might appeal the district court's judgment denying his motion to vacate his sentence, filed under 28 U.S.C. § 2255.

Upon consideration, the court has concluded that it did not act under any misapprehension of law or fact in its order entered on June 11, 1998. Fed. R. App. P. 40(a). Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

ORDER DENYING SECTION 2255 MOTION

Filed December 2, 1997

Pages C-1 thru C-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRELL SPENCER,
Petitioner-Movant,

CIVIL ACTION NO. 97-CV-71601-DT
CRIMINAL NO. 93-CR-80037-DT

vs.

HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,
Respondent.

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY _____ DEPUTY CLERK

ORDER

The Court has reviewed the file and the Magistrate Judge's Report and Recommendation submitted herein and any timely objections filed thereto in accordance with 28 U.S.C. 636 (b) (1) (B). The Report and Recommendation regarding the instant Motion to Vacate, Set Aside or Correct Sentence is hereby accepted and entered as the findings and conclusions of the Court;

Now, therefore, IT IS ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence is hereby DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Nancy G. Edmunds
NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

DATED: DEC 02 1997

APPENDIX D

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

JUDGMENT DENYING SECTION 2255 MOTION

Filed December 2, 1997

Pages D-1 thru D-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRELL SPENCER,
Petitioner-Movant,

CIVIL ACTION NO. 97-CV-71601-DT
CRIMINAL NO. 93-CR-80037-DT

vs.

HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,
Respondent.

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY _____
DEPUTY CLERK

JUDGMENT

The Court has reviewed the file and the proposed Report and Recommendation of the Magistrate Judge submitted herein, and on this date concurred with and adopted the said Report and Recommendation;

Now, therefore, IT IS ADJUDGED that the Motion to Vacate, Set Aside, or Correct Sentence is hereby DENIED.

Dated at Detroit, Michigan, this __ _____ day of DEC 02 1997, 1996.

/s/ Nancy G. Edmunds
NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

ORDER DENYING
CERTIFICATE OF APPEALABILITY

Filed January 8, 1998

Pages E-1 thru E-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY _____ DEPUTY CLERK

Darrell Spencer,
Petitioner,

v.

Case No. 97-71601
Hon. Nancy G. Edmunds

United States of America,
Respondent.

_____/

ORDER DENYING CERTIFICATE OF APPEALABILITY

On December 2,1997, this Court denied Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner has now filed a timely notice of appeal and a request for a certificate of appealability pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b).

Section 2253 requires a petitioner seeking relief from a final order in a proceeding under section 225 to seek a certificate of appealability from this Court. 28 U.S.C. § 2253(c)(1)(B). The court may issue a certificate of appealability only if the petitioner has made a substantial showing of the denial of a constitutional right. Id. § 2253(c)(2). The standard for granting a certificate of appealability is the same as the old standard for granting a certificate of probable cause. Lyons v.

Ohio Adult Parole Authority, 105 F.3d 1063, 1073 (6th Cir. 1997). Under this standard,

> the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner] or that the questions are "adequate to deserve encouragement to proceed further."

Barefoot v. Estelle, 463 U.S. 880, 893, n. 4 (1983).

This Court finds that Petitioner has not made a substantial showing of the denial of a federal right. Being further advised in the premises and having read the pleadings, the Court hereby DENIES the motion for a certificate of appealability.

SO ORDERED.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: JAN 08 1998

APPENDIX F

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

JURY INSTRUCTIONS REGARDING
SECTION 924(c) COUNT

Filed April 24, 1993

Pages F-1 thru F-6

Statute Involved

Section 924(c) of Title 18, United States Code, provides in part:

> Whoever, during and in relation to any drug trafficking crime for which he may be prosecuted in a court of the United States, uses and carries a firearm, shall be guilty of an offense against the United States.

For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substance Act.

I instruct you as a matter of law that the crime of possession with intent to distribute cocaine base, as charged in this indictment, if proven beyond a reasonable doubt, is a felony punishable under the Controlled Substances Act.

The essential elements of the offense, each of which the Government must prove beyond a reasonable doubt, are:

FIRST: That on or about the date alleged in the indictment, the defendant used or carried a firearm; and

SECOND: That the defendant had knowledge that what he was using or cariying was a firearm; and

THIRD: That the defendant used or carried a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States.

Firearm- Defined

Under Title 18 of the United States Code, Section 922(a)(3), the term "firearm" includes any "weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. . ."

For the purposes of Count Three, the word "carries" does not require that the government prove actual possession, nor does the word "use" require the government to prove that the defendant fired or displayed the firearm. Rather, it is sufficient to convict the defendant if you find beyond a reasonable doubt that he had possession of a firearm, or that he had a firearm under his control and the firearm was possessed or controlled in any manner to facilitate the drug trafficking crime. Thus, if you find beyond a reasonable doubt that the defendant had the weapon, as charged in Count Three readily accessible for possible use to secure or protect the drugs, the drug proceeds, or the participants in the drug transaction, you can find him guilty of Count Three.

The defendant's sole purpose in the carrying of the weapon need not have been facilitation of the drug trafficking crime.

The element of knowledge the government must prove beyond a reasonable doudt is that the defendant had knowledge that what he was using or carrying was a firearm.

An act is done knowingly if it is done purposely and voluntarily, not by mistake or accident. In order for the government to satisfy this element, it must prove that the defendant knew that he was using or carrying a firearm during and in relation to a drug trafficking crime. It is not necessary for the government to prove that the defendant knew he was violating any law by so using or carrying the firearm.

APPENDIX G

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

TRANSCRIPT OF SENTENCING

Filed September 14, 1993

Pages G-1 thru G-4

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

Case No. 93-80037
Detroit, Michigan
Tuesday,
September 14, 1993
Judge Nancy G. Edmunds

DARRELL SPENCER,
Defendant

_____/

SENTENCE

BEFORE THE HONORABLE
NANCY G. EDMUNDS, FEDERAL JUDGE
TRANSCRIPT ORDERED BY: LAWRENCE R. GREENE

APPEARANCES:

For the Plaintiff:	United States Attorney Office BY: J. MICHAEL BUCKLEY 817 U.S. Courthouse Detroit, MI 48225
For the Defendant:	BY: CORNELIUS PITTS 3650 Penobscot Building Detroit, MI 48225
Recorded by:	Cheryl Wynne 133 U.S. Courthouse Detroit, MI 46225
Transcribed by:	Lynn L. Spietz 13810 Courtland Oak Park, MI 46237

as Mr. Spencer, largely, because I think of the racial aspects. And I just think that in light of the fact that the guidelines were established in order to equalize, supposedly, the disposition or the sentences of various individuals, it certainly puts a harder burden, or at least the defendants that are involved with crack cocaine, certainly get a worse, I think, shake, if I can use the vernacular, and than those who may be involved with hundreds of kilos of crack -- I mean of cocaine powder. And I think those are the ones that the drug laws supposedly have been established from the very go, to ferret out, and to -- to put into the institutions.

So it would seem to me that -- that there's a validity to that type of approach, or at least an attack upon that particular aspect of the guidelines.

Having said that, I'm not too sure if there's anything else that I can say on behalf of the Defendant.

THE COURT: Apart from the presentence report -- and I don't -- I don't know if you intended your last comments to -- to relate to the presentence report, or just more generally -- but I'll give you further opportunity if there is anything else

that you wish to say on behalf of Mr. Spencer at this time.

MR. PITTS: I'm just not too sure how effective what counsel can say at this particular stage is. I'm not too sure, because I'm not normally in this position -- that's number one.

Number two, I think that the guidelines, from what I've read, and from what little familiarity I have with them, are so I guess firmly entrenched now in the judiciary system, that it takes a bold stroke, and, indeed, a -- perhaps a -- a highly unusual circumstance to provoke that stroke, to have them somehow veered from, or deviated from. And I'm not too sure if there's anything in Mr. Spencer's background, and/or in the circumstances of this particular case, that would justify such an attack, except that which I've alluded to in the previous comment regarding the -- the distinction between crack cocaine and cocaine, itself.

THE COURT: Okay. Thank you for your comments.

Mr. Spencer, I have received the letter that you wrote, and read it, and considered it, and I will include it as part of the record in this case.

Is there anything further that you wish to say on your own behalf before I impose sentence in this matter?

THE DEFENDANT: I'm kind of shook up to say too -- too much of anything now, but I will just -- I would like to say I didn't -- I didn't mean to take nobody, or no one through no problems and no difficulty, no trouble at that, and that's it. Thank you, your Honor.

MR. PITTS: With the Court's permission, may I inject something?

APPENDIX H

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

EXCERPT OF GOVERNMENT'S
CLOSING ARGUMENT

Filed June 24, 1993

Pages H-1 thru H-2

You know from the evidence in this case, that on January 14th of 1993, the agents from the Drug Enforcement Administration, the DEA, were directed what's called a "buy/bust operation." And you know that Special Agent Kevin Driscoll, who is the case agent in this case, was personally directing that particular buy/bust. It involved a man named Myron Vaughn. And if you'll recall, in the parking lot of the Trade Winds Liquor Store, located at Wyoming and Tireman Streets in the city of Detroit, the agents arrested Myron Vaughn, who was found to be in possession of two ounces of crack cocaine, admitted into evidence as Exhibit 1.

You've heard from the testimony that two ounces of crack cocaine is a substantial amount. The two ounces of crack cocaine is more than a person would generally possess for personal use.

You've also heard during the course of this trial, and it is uncontradictive, that Myron Vaughn, after his arrest, agreed to cooperate. A DEA agent said to him, "Mr. Vaughn, we want you to telephone your source of supply, call the person from whom you got this two ounces that you were going to sell for $2,200 before we arrested you, and tell him the buyer wants six ounces of crack." And

you know from the testimony of Special Agent Richard Crock that those calls were placed. And you know from the testimony of Special Agent Richard Crock, who personally dialed the numbers on Mr. ....

APPENDIX I

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

Filed September 8, 1997

Pages I-1 thru I-15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN -
SOUTHERN DIVISION

DARRELL SPENCER,
Petitioner-
Movant, CIVIL ACTION NO. 97-CV-71601-DT
CRIMINAL NO. 93-CR-80037-DT

vs.

HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,
Respondent.

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

RECOMMENDATION: The instant Motion to Vacate, Set Aside, or Correct Sentence should be denied as Petitioner has shown no violations of his federal constitutional rights resulting from alleged ineffectiveness of trial counsel.

* * *

Petitioner, currently a prisoner at the Federal Correctional Institute at Bradford, Pennsylvania, filed a Motion to Vacate, Set Aside, or Correct Sentence, under 28 U.S.C. § 2255, on April 15, 1997, challenging the validity of his

underlying federal convictions. Petitioner was convicted following a jury trial in June 1993 in the United States District Court for the Eastern District of Michigan of possession with intent to distribute cocaine base, possession with intent to distribute cocaine base within 1000 feet of a public school, and use of a firearm during a drug trafficking crime. The convictions were later affirmed by the Sixth Circuit Court of Appeals on January 4, 1995.

In his Motion to Vacate, Petitioner raises the following three claims:

1. He was denied a fair trial because a jury instruction on aiding and abetting under 18 U.S.C. § 2 was given even though he was not charged under that statute.
2. Based on the recent United States Supreme Court ruling in Bailey v. United States, 116 S.Ct. 501 (1995), his conviction for using a firearm during a drug trafficking offense should be reversed

because of a fatally flawed jury instruction.

3. He was denied the ineffective assistance of trial counsel.

The Respondent filed an answer to the Motion to Vacate on June 27, 1997, contending that since Petitioner had not challenged the aiding and abetting jury instruction on direct appeal, he had waived this claim and could not seek habeas relief on this issue. Moreover, while Pailey excludes some acts that formerly would have fallen within the ambit of § 924(c), Respondent asserted that Petitioner still violated the statute since evidence introduced at his trial indicated that he had pointed a firearm at a customer during a narcotics transaction. Finally, Respondent maintained that Petitioner had not been denied the effective assistance of counsel. Petitioner filed a reply to Respondent's answer on July 11, 1997, essentially reiterating the allegations found in his Motion to Vacate.

The facts upon which the challenged convictions are based can be excerpted from the unpublished per curiam opinion of the Sixth Circuit Court of Appeals

dated April 21, 1995, denying Petitioner's appeal as of right:

> This prosecution stems from a cocaine base "buy-bust" operation organized by Drug Enforcement Agency ("DEA") agents in Detroit. After arresting an individual named Myron Vaughn for drug trafficking, DEA agents used him as a "cooperating individual." At the direction of the agents, Vaughn arranged to purchase cocaine base from a source. This transaction subsequently occurred in a liquor store parking lot located within 1,000 feet of two public schools. A white van appeared and Vaughn got in. Before DEA agents could make an arrest, however, the van sped away. After colliding with another car, three men jumped from the van and ran. Defendant was arrested as he fled down an alley. In a three-count indictment, a grand jury charged defendant with drug trafficking (21 U.S.C. § 841(a) (1)), drug trafficking

within 1,000 feet of a public school (21 U.S.C. § 860), and use of a firearm in relation to a drug- trafficking offense (18 U.S.C. § 924(c)(1)). Defendant elected to go to trial and was convicted on all counts.

47 F.3d 1172 (6th Cir. 1995) (table); 1995 WL 5615

1. CAUSE AND PREJUDICE FOR FAILURE TO RAISE ISSUE ON DIRECT APPEAL

Violations of federal law are cognizable only if they involve a "fundamental defect" causing a "complete miscarriage of justice," or are so egregious that they amount to a violation of due process. Hill v. United States, 368 U.S. 424, 426 (1962). A prisoner seeking to vacate his sentence pursuant to § 2255, however, may not obtain relief unless he first establishes both "cause" and "prejudice" from his failure to raise the issues on direct appeal. Failure to do so precludes relief under § 2255. United States v. Frady, 456 U.S. 152, 167-169 (1982); Ratliff v. United States, 999 F.2d 1023, 1025 (6th Cir. 1993).

Petitioner, who was jury convicted of possessing cocaine with intent to

distribute cocaine base, contends that he was denied a fair trial because a jury instruction on aiding and abetting under 18 U.S.C. § 2 was given even though he was not charged under that statute. Petitioner, however, did not raise this issue on direct appeal to the Sixth Circuit[1] and he has failed to show cause or prejudice for not doing so. Petitioner has not stated any reason for not raising his objection later on appeal thus he has failed to show cause for not raising this issue in earlier proceedings and the petition should be dismissed on that ground alone. United States v. Walsh, 733 F.2d 31, 34-35 (6th Cir. 1984).

However, even if Petitioner could show both cause and prejudice for not raising this issue earlier on direct appeal, it would still lack merit because the trial court did not err in giving an instruction on aiding and abetting even though the Petitioner was not specifically indicted on that count. As

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[1]On direct appeal before the Sixth Circuit, Petitioner challenged the remarks made by the prosecutor during opening statement, the introduction of evidence related to his prior arrests and the sufficiency of the evidence presented at trial.

the court noted in United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971), 18 U.S.C. § 2 is an alternative charge in every count, whether explicit or implicit, and the rule is well-established that one who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense. See also United States v. Lester, 363 F.2d. 68, 72 (6th Cir. 1966); United States v. Taylor, 464 F.2d. 240, 241 n.1 (2nd Cir. 1972); United States v. Walker, 621 F.2d 163, 166 (5th Cir. 1980); Glass v. United States, 328 F.2d 754, 756 (7th Cir. 1964). As a result, this claim should be dismissed as being without merit.

2. BAILEY CLAIM

Petitioner next seeks to set aside his conviction and sentence for using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Based on the recent United States Supreme Court ruling in Bailey v. United States, 116 S.Ct. 501 (1995),[2] Petitioner now argues that his

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[2]The Court in Bailey held that to obtain a conviction for use of a firearm under § 924 (c) (1), the government must

conviction under § 924(c) (1) is unconstitutional. Even though Petitioner's conviction occurred pre-Bailey, the holding in that case still applies. United States v. Allen, 106 F.3d 695, 701 (6th Cir. 1997). The government concedes that the jury instruction in the instant case was erroneous in the light

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prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S.Ct. at 505. "Use," the Court said, would include activities such as "brandishing, displaying, bartering, striking with, . . . firing or attempting to fire, a firearm," or referring to a firearm so as to intimidate another person. Id. at 508. However, the Court added, the "inert presence of a firearm, without more, is not enough to trigger § 924(c) (1) . . . . A defendant cannot be charged under § 924(c) (1) merely for storing a weapon near drugs or drug proceeds." Id. In so ruling, the Supreme Court implicitly overruled prior Sixth Circuit authority holding that a defendant could be convicted under § 924(c) (1) based on evidence that the firearm was physically available to the defendant or that the defendant intended to use it if the need arose. See, e.g., United States v. Henry, 878 F.2d 937, 944 (6th Cir. 1989).

of Bailey, for it merely utilized "use" and "carry" as self-defining terms.

Despite the fact that the instruction was erroneous, the question on review remains whether, given the evidence at trial, a properly instructed jury would have found the Petitioner guilty of carrying or using the firearm. United States v. Mauldin, 109 F.3d 1159, 1161 (6th Cir. 1997). The undersigned is persuaded after a review of the trial transcript that a properly instructed jury would have found Petitioner guilty of either "using" or "carrying" the firearm.

The prosecution presented evidence that Petitioner was driving the white van after picking up the confidential informant and another individual (Vol. III, TR 103-104).[3] After the van ran a stop sign and collided with another car, Petitioner was arrested by police officers after a short chase (TR 107). The confidential informant, Myron Vaughn, later told DEA agent Richard Crock that Petitioner had pointed a gun at him while

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[3]Since the trial transcript is divided into fives volumes (Criminal Docket #28-32), reference is hereby made to the volume number and then transcript page where the testimony can be found.

driving the van, and that Petitioner had thrown several ounces of crack cocaine out the window during the chase (TR 6/22/1993, TR 117-118). Six ounces of cocaine were later recovered along the route of the van (TR 119).

In a similar case, United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996), this Circuit held that the "carry" prong of Bailey was met by evidence that the gun was visibly placed in the driver's side of the console, within easy reach and immediately available for use. Unlike Riascos-Suarez, Petitioner here actually held the firearm in his hand while he was driving the van away from police and used it to threaten the confidential informant. While Bailey excludes some acts that formerly would have fallen within the ambit of § 924(c), it is still a violation of the statute to point or brandish a firearm at a customer during a narcotics transaction.

Taken in the light most favorable to the prosecution, there was sufficient proof offered by the government to support the finding of the jury that Petitioner actively used a firearm during the drug transaction. With the abundance of evidence in the present case, together with the inferences properly deducible

therefrom, the undersigned is persuaded that a properly instructed jury would still have found him guilty of "using" and "carrying" the firearm.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

Typically, ineffective assistance of counsel claims are not cognizable on direct appeal. United States v. Gonzales, 929 F.2d 213, 215 (6th Cir. 1991); United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir. 1989) ("This court will not review an ineffective assistance of counsel claim raised for the first time on appeal."). The customary procedure followed in this situation within the Sixth Circuit is to permit the defendant to raise his ineffectiveness of counsel claim in a proper post-conviction proceeding under 28 U.S.C. § 2255. United States v. Castro, 908 F.2d 85, 89 (6th Cir. 1990) ("Furthermore, although it strongly appears that defendant Rocha was not denied effective assistance of counsel, this court declines to consider the claim of ineffective assistance of counsel for the first time on appeal. The defendant may properly raise this issue in a motion to the district court pursuant to 28 U.S.C. § 2255.").

Petitioner argues that the representation he received in the trial

court was ineffective and therefore violated his Sixth Amendment right to counsel. Petitioner maintains that he was denied the effective assistance of trial counsel because his attorney should have: a) objected to the aiding and abetting jury instruction, b) objected to the quantity of drugs attributed to him, c) called the expert witnesses he had requested, and 4) not stipulated to the government's lab report and chemist's testimony.

In order to establish an ineffective assistance of counsel claim, however, Petitioner has the burden of demonstrating that (1) his attorney made serious errors which undermined the proper functioning of the adversarial process, and that (2) but for those errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant asserting a claim of inadequate counsel must satisfy both elements of the test; the defendant must demonstrate constitutionally inadequate assistance of counsel and prejudice resulting therefrom. Id. at 697. Judicial scrutiny of counsel's performance must be highly deferential, Id. at 689, and because of the difficulties in assessing counsel's performance, a reviewing court

must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the (Petitioner) must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. (citing Michel v. New York, 350 U.S. 91, 101 (1955))

The Petitioner has not met his burden here, and, upon review, the undersigned is persuaded that he has failed to show any serious errors in, or prejudice resulting from, his attorney's performance. As noted above, one who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense. Consequently, Petitioner's counsel was not ineffective for failing to object to the aiding and abetting jury instruction. As for the claim that his counsel was ineffective for failing to argue that not all cocaine base is crack, Petitioner is relying on amendments to the Sentencing Guidelines that did not take effect until well after his trial and sentencing in November 1993.

Contrary to Petitioner's assertion, counsel's determination to present specific witnesses and not call others is

a matter of trial strategy and generally does not support a claim of ineffective assistance of counsel. United States v. Medved, 905 F.2d 935, 942 (6th Cir. 1990) (failure to call a witness that defendant believed was important did not amount to ineffective assistance of counsel). In addition, the assertion that trial counsel entered into a stipulation of fact (that certain government exhibits were analyzed by qualified experts and found to contain cocaine base) without Petitioner's knowledge or approval is without merit since there is no affidavit or other evidence supporting such contention. Moreover, a stipulation to an uncontestable fact sometimes helps a defendant by focusing the jury's attention on points that are in contention. There would have been no point in contesting the chemical composition of the exhibits as something other than cocaine base given the expert chemist's report. By stipulating that the exhibits were cocaine base, defense counsel may have tried to focus the jury's attention on his stronger claim that Petitioner was not responsible for the substance, whatever it was.

Having failed to establish that counsel's performance fell below objective standards of reasonableness or

that he was prejudiced to the point of being wrongly convicted, Petitioner has failed to overcome the presumption that, under the circumstances, the challenged actions of his trial counsel might be considered sound trial strategy. Accordingly, Petitioner's claim that he was denied the effective assistance of counsel at the trial level should be rejected as he has shown no prejudice resulting from the alleged error.

For all the foregoing reasons, then, the undersigned recommends that the Motion to Vacate, Set Aside, or Correct Sentence be denied. The parties are advised that any objection to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge Edmunds' acceptance thereof is waived.

/s/ Thomas A. Carlson
THOMAS A. CARLSON
UNITED STATES MAGISTRATE JUDGE

DATED: 9/8/97

cc: Honorable Nancy G. Edmunds
Darrell Spencer
Karl Overman

APPENDIX J

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

EXCERPTS FROM TRIAL TESTIMONY OF
RICHARD CROCK

Filed June 22, 1993

Pages J-1 thru J-9

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

Case No. 93-80037
Detroit, Michigan
Tuesday,
June 22, 1993

DARRELL SPENCER,
Defendant

Judge Nancy G. Edmunds

_____/

TRIAL - VOLUME II

BEFORE THE HONORABLE
NANCY G. EDMUNDS, FEDERAL JUDGE
TRANSCRIPT ORDERED BY: LAWRENCE R. GREENE

APPEARANCES:

For the Plaintiff:	United States Attorney Office BY: J. MICHAEL BUCKLEY 817 U.S. Courthouse Detroit, MI 48225
For the Defendant:	BY: CORNELIUS PITTS 3650 Penobscot Building Detroit, MI 48225
Recorded by:	Cheryl Wynne 133 U.S. Courthouse Detroit, MI 46225
Transcribed by:	Lynn L. Spietz 13810 Courtland Oak Park, MI 46237

talk to Myron Vaughn?

A. Yes, I did.

Q. Where did you next see Myron Vaughn?

A. Near the area where the van was wrecked.

Q. Without telling us at this point what Myron Vaughn may have said, did he say anything to you?

A. Yes.

Q. Did you see Vaughn getting out of the van?

A. No.

Q. You had seen him get in the van before the chase?

A. Yes.

Q. How soon after the collision would you say you talked to Myron Vaughn?

A. Several minutes.

Q. Without telling us, again, what Mr. Vaughn told you, did he tell you anything unusual happened inside the van?

A. Yes.

MR. PITTS: Excuse me, Judge. How can he say, without telling us what he told you, did he tell you something about unusual? That's objectionable.

THE COURT: I -- I think that you're kind of back- dooring the hearsay here.

MR. BUCKLEY: Your Honor, what I'm attempting to do is lay a foundation for an excited utterance, which I will do right now with the Court's permission.

THE COURT: Okay.

BY MR. BUCKLEY:

Q. What did Myron Vaughn tell you?

MR. PITTS: Well, wait a minute --

THE COURT: Well, wait a minute.

MR. PITTS: -- that's objectionable.

MR. BUCKLEY: Well --

THE COURT: So far, I -- I don't have an adequate foundation for an excited utterance.

BY MR. BUCKLEY:

Q. Sir, are you aware that a high speed chase ensued moments before Myron Vaughn talked to you?

A. Yes.

Q. You're aware that the van in which Myron Vaughn was situated was involved in the collision?

A. Yes.

Q. Are you aware whether the van in which Myron Vaughn was situated had collided with anything else?

A. Yes, I was.

MR. PITTS: Judge, that type of questioning, as I indicated yesterday, is objectionable. There have been only three words spoken, or four words spoken

by this officer in response to the questions.

THE COURT: Well, I don't find that --

MR. PITTS: (Interrupting.) All of them are "yes." Who's doing the testifying? The questioner is doing the testifying. They're all leading questions.

THE COURT: The foundational questions are not objectionable, and I overrule your objection on this. He's just -- I mean, they're all foundational questions with respect to facts that are already in evidence, with respect to an evidentiary matter.

MR. PITTS: (Interrupting.) Well, then they're repetitive, they're redundant and they need not be asked.

THE COURT: Overruled, Mr. Pitts.

MR. BUCKLEY: May we approach, your Honor? Because I'm sure there'll be an objection to the next question.

MR. PITTS: Well, then, don't ask.

THE COURT: Mr. Pitts?

(At about 11:55 A.M.— conference at the bench out of the hearing of the jury; conference whispered.)

MR. PITTS:Judge, I resent this man telegraphing his testimony.

MR. BUCKLEY: (indiscernible)

THE COURT: Okay, let's cut it out!

MR. PITTS: (indiscernible) if you want to. The facts (indiscernible) --

THE COURT: Cut it out!

MR. PITTS: -- the fact of the matter is, he indicated that he was going to try to get this guy's testimony in now by an excited utterance. He's telegraphing what he wants this man to do, and he's (indiscernible).

THE COURT: I don't --

MR. PITTS: I've been in testimony — I've been in trial before these guys before, and he --

THE COURT: I mean, I don't think what he's done so far. Now, what's your next question?

MR. BUCKLEY: What did Myron Vaughn say?

THE COURT: And what's he going to say?

MR. BUCKLEY: He's going to say inside the van Mr. Spencer brandished a gun at him. He asked what was going on, and Mr. Spencer had the six ounces of crack cocaine on him. I'm going to be able to establish that Myron Vaughn took (indiscernible) the six ounces when we picked him up.

Excited utterance, as I'm sure Mr. Pitts is well aware of, under 803(2) there's three foundational elements: One, there was a startling act. Secondly,

that the statement was made while the person of intent was under the influence of the startling act, and third, the sufficient time had not elapsed to make it no longer stargling.

Here we've got a man who was in the van, number one, and number two, had a gun in his face, and he gets out and says, within minutes, this is what happened.

MR. PITTS: It would seem to me, first of all, that we had a startling event is something that's a conclusion on this man's part, under the declarant's part. That's the first thing. The second thing is, he's trying to do indirectly what he can t do directly. He's trying to over compensate for this man not coming in to testify.

MR. BUCKLEY: No.

MR. PITTS: It would seem to me --

THE COURT: Let him finish up.

MR. PITTS: No, that's okay.

THE COURT: You can finish. You may be right that he's trying to compensate, but he's allowed to do what he can do (indiscernible) and it seems to me that he has laid the appropriate (indiscernible) --

MR. PITTS: (indiscernible) I'm going to ask the Court to give me an opportunity to research some law then.

THE COURT: You can research it this afternoon.

MR. PITTS: Okay.

(At about 11:57 A.M. — bench conference concluded.)

MR. PITTS: I always like to walk fast, Mr. Buckley. (indiscernible) in deference to age.

MR. BUCKLEY: Thank you.

THE COURT: I find that an -- that proper foundation has been laid under Rule 803(2) for an excited utterance being a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

You may proceed.

MR. BUCKLEY: Thank you, your Honor.

BY MR. BUCKLEY:

Q. Agent Crock, what did Myron Vaughn tell you?

A. He stated that Rail -- Mr. Spencer -- was --

MR. PITTS: That's objectionable. There's no identity of "Rail" to Spencer. As a matter of fact, on the contrary, there's no testimony, there's nothing in this particular comment that shows that, indeed, Rail is Spencer; it's Sharraill. And I don't think that he is fair, and he

can -- can do that legitimately. And I object to that.

THE COURT: Let's -- let's -- all we can have, under this exception, is the exact words spoken by Mr. Vaughn. What was the excited utterance? Okay?

MR. BUCKLEY: I think the witness is trying to tell us, your Honor. And — and this is evidence, not opening statements.

BY MR. BUCKLEY:

Q. What did Myron Vaughn tell you, sir?

A. He stated -- T

THE COURT: What were his words — his exact words?

THE WITNESS: He stated that Rail was holding a gun on him when he was driving in the van, asking him "What's going on, Myron?" And that he threw the crack cocaine out the window. And that's basically it.

BY MR. BUCKLEY:

Q. That who threw the crack cocaine out the window?

A. Rail.

Q. He said Rail was driving?

A. Yes.

MR. PITTS: See, Judge, he didn't even say Rail was driving.

THE COURT: He -- yes, he did.

MR. PITTS: Excuse me, he said, "Rail --

THE COURT: Yes, he did. He said "Rail, while he was driving, was brandishing a gun at him." That's what I heard him say.

MR. PITTS: I didn't hear that, but, Judge, I'm not going to argue about it.

BY MR. BUCKLEY:

Q. Agent Crock, based on the information that you received from Myron Vaughn, did you take any action at that point?

A. Yes, I did.

Q. What did you do personally?

A. I placed Vaughn in the back of my vehicle and drove northbound on Central.

Q. And what action did you personally take?

A. I began a search of the area to recover the crack cocaine.

Q. Can you tell the jury what the ground conditions were at

APPENDIX K

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

TRANSCRIPT OF MYRON VAUGHN'S
GRAND JURY TESTIMONY

Filed January 21, 1993

Pages K-1 thru K-10

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:

FEDERAL GRAND JURY

Case No. 92-5-134

Proceedings had and testimony taken of MYRON VAUGHN before a Federal Grand Jury at Room 950, Federal Building, Detroit, Michigan, on Thursday, January 21, 1993.

PRESENT:

CARL OVERMAN
Assistant United States Attorney

REPORTED BY:

Sylvia Velasquez
Court Reporter

Detroit, Michigan
Thursday, January 21, 1993
3:15 p.m.

- - -

(Myron Vaughn entered the Grand Jury room.

THE FOREPERSON: Before you site down, will you raise your right hand while I give you the oath.

Do you solemnly swear that the testimony you will give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

EXAMINATION

BY MR. OVERMAN.

Q. Would you state your name for the record.

A. Myron Antwan Vaughn.

Q. Okay. Mr. Vaughn, for witnesses who are not agents, we basically go over their rights. For example, you have the right not to say anything that will tend to incriminate you.

Do you understand that?

A. Yes.

Q. You have the right to an attorney. Even though the attorney cannot be in the room, you can request an adjournment to go consult with the attorney if you feel a need to do that.

Do you understand that?

A. Yes.

Q. You've been placed under oath and if you were to lie under oath, you could be charged with perjury which carries a 5 year sentence and/or a $250,000 fine and you could be charged with giving a false statement which carries a 5 year sentence and a $250,000 fine.

Do you understand that?

A. Yes.

Q. Now on January 14th, 1993, were you arrested by DEA?

A. Yes.

Q. Okay. And as a result of that arrest, did you agree to make a phone call on behalf of DEA?

A. Yes.

Q. And who was that phone call to?

A. I just learned his name. I never knew his name, but his name is Darrell Spencer.

Q. Well, what did you know him by?

A. Rail.

Q. And how did you get the phone number?

A. Because he was—I know him from over my cousin's—all my family. That's the only person I knew over there. He would come and talk to me.

Q. What was the purpose of the phone call?
A. For two ounces of cocaine.
Q. Was it two ounces or was it six?
A. It was six. First time was two, second time was six.
Q. Okay. Now for the six-ounce deal, was there a location that it was agreed that that would take place?
A. On Wyoming and Chicago.
Q. Okay. And, in fact, did you go to Wyoming and Chicago?
A. Yes.
Q. This was on January 14th, 1993?
A. Yes.
Q. Here in Detroit?
A. Yes.
Q. And at Wyoming and Chicago, was this an apartment building, supermarket; what was that?
A. Party store.
Q. And did you go in the party store--was this outside or what?
A. Outside.
Q. Did the individual that you called, did he show up?
A. Yes, he did.
Q. And what kind of vehicle was he in?
A. A van--a white van. I'm not sure what model. I think it was a Dodge or something like that.
Q. Okay. Did you get in the van?

A. Yes, I did.
Q. And who was in the van or how many people were in the van?
A. Two people.
Q. And had you previously met the third person?
A. No, I hadn't. He was with him the first time when I met with him but I didn't know him then. I didn't know who he was.
Q. Now, after you got in the van, did there come an occasion when the DEA announced that they were there?
A. When I got in the van he went to go pull over right by the door of the store and as he went to pull over, cars just started coming into the parking lot-and he just took off. He jumped the curb and went going down Chicago on the wrong side.
Q. When you say cars, cars of who?
A. I guess it was the DEA.
Q. Law enforcement officials?
A. Yes.
Q. And so he went down the wrong side of the street on Chicago, did you say?
A. Yes.
Q. Did he go through any stop signs, traffic lights, things like that?
A. I believe the light was green but he kept going on Chicago down the wrong

way, all the way 'til we got to the railroad tracks. And a big truck was coming up and we had to turn and he turned down a side street and went down that side street.

Q. And what happened when he went down the side street?

A. We were going down the side street and the other guy was hollering "We got to throw this out. We got to throw it out." And Rail was asking me what was going on?

I said, "I don't know what's going on." He asked me did I know what was going on.

I said "I don't know what's going on."

He said, "Are you sure you don't know what's going on."

And I said, "I don't know what's going on."

The other guy said, "We got to get rid of the stuff."

So he gave it to Rail and told Rail to throw it out. Rail said, "I can't throw it out the driver' s side." And he told the other guy to roll down his window and he threw it out the passenger side.

Q. Who threw it out?

A. Rail did.

Q. And what was supposed to be in that? What was your understanding was in the package that was thrown out?

A. The six ounces.

Q. And that's because you had ordered, supposedly, that six ounces?

A. Yes.

Q. And during the time that you were in the vehicle, did you see any weapons?

A. Yes.

Q. Was this a rifle, machine gun, handgun; what kind of weapon?

A. It was an automatic weapon. I'm not sure.

Q. And where was it at when you saw it in the vehicle?

A. The guy he gave Rail everything. He gave it to him to throw it all out the window. He said "I can't throw it out the driver's side. He threw the dope and right after he threw that he went right straight on the road. A car was coming and came around and hit us. We spun around in a circle and the passenger's door flew open. The guy was gone and I was in the back trapped. Rail jumped out and when I got out DEA took me and was slamming me to the van and threw me in the snow, and I looked up to see the gun was at the back of

the van. inc in the snob, and I looked up to see the gun was at the back of the van.

Q. So who did you see in possession of that gun in the van?

A. Both of them. Rail never had it 'til the guy gave it to him to throw it. The guy had everything when he gave it to Rail to throw it. That's when he had it.

After the accident and I looked up, I didn't know who had it or whatever. When the accident occurred, or whatever, when I looked in the snow, I just looked up and I saw the gun. The police officers said if we didn't know that you were in the van we would have shot you because the gun was so close to you.

MR. OVERMAN: I have no further questions of the witness at this time.

Any questions of the witness?

A JUROR: Who was this third person, the guy?

BY MR. OVERMAN:

Q. Did you know the identity of that third person?

A. I never knew him before I got in the van. I just got in from the back door and closed the door and he was just always looking forward.

A JUROR: Was he this Rail's associate then?

A. Must be.

A JUROR: Were you asked by the DEA to make a buy or was this your own buy?

A. No, they asked me to.

A JUROR: So it was an operation that you were assigned to do by the Drug Enforcement Agency?

A. Yes.

BY MR. OVERMAN:

Q. You got arrested that day and as a result of being arrested, you agreed to make this order or contact?

A. Because they were talking about going and kicking in my door saying there was guns and dope and everything in my house when I said there wasn't. And he said you'll have to prove that there's no guns or dope or money in your house, so "cu're going to have to this that guy for us. So I called him.

MR. OVERMAN: Any other questions?

A JUROR: What happened to the guy, Rail, and the other guy you didn't know? What happened to them after the accident?

A. Rail was caught. The other guy—like I said, as soon as the accident happened, the door was like open and he was gone. I don't know where he went or which way he went:

MR. OVERMAN: Any other questions?

(No further questions were posed by the Grand Jury.)

BY MR. OVERMAN:

Q. You've testified today under oath and under penalty of perjury and giving false statements as well. Now, as a result of what you've said today, is there anything you want to change now that you have a chance to avoid penalties for perjury or false statements?

A. No.

Q. Your answer is no?

A. Yes, I don't have anything.

Q. Okay. Thank you.

(Myron Vaughn left the Grand Jury room.)